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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-754

RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al., *Appellants,*

vs.

BOOKER T. HILLERY, JR., et al., *Appellees.*

On Appeal from the United States District Court for the Northern District of California

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Appellees, in defense of the district court's order, characterize California Department of Corrections Manual Section 415.071[1] as a "total ban" of all press

[1]"Press and other media interviews with specific individual inmates will not be permitted." Appellants were compelled by a temporary restraining order to cease enforcement of this Section on November 1, 1972, and to substitute interim procedures. No stay of the August 16, 1973, decision was sought inasmuch as a stay would not have permitted the use of Section 415.071. On March 26, 1974, the district court continued the proceedings until June 7, 1974, in expectation of the disposition of the appeals in this Court.

interviews with designated, willing prisoners, at all penal institutions and under all circumstances. The decision of the district court is not premised on such a finding; appellees set up a "straw man" to attack when the real issue is elsewhere. The California Department of Corrections has never imposed a "total ban" on inmate access to the press. The district court found that the "regulation does not effect an absolute ban on all media interviews with inmates" (Jurisdictional Statement, Appendix A, p. V). The decision, rather, turns on the finding, which appellants urge is erroneous, that face-to-face interviews with media representatives are a "vital element" in the prisoners' rights under the First Amendment.

By arguing that Section 415.071 is a "total ban," in spite of the district court's finding and the undisputed evidence to the contrary, appellees facilitate their jump to a conclusion that a right of free speech has been violated and, as an apparent afterthought, a right to petition the government for redress of grievances has been imperiled. This new choice of argument would appear to limit the asserted right to interviews to inmates who wish to relate complaints about prison conditions, and to exclude inmates who wish to discuss other subjects. *cf. McMillan v. Carlson*, ...F.Supp. ....., Civ. 72-2551-M, slip op. at 3-4 (D. Mass. Dec. 13, 1973). However, the perspective of this case is quite different and the thrust of this appeal cannot be diverted by changing the context of the facts and the law.

The district court correctly found that the "tragic events of August 21, 1971" were viewed by prison

administrators as the climax to mounting disciplinary problems caused, in part, by a "laissez-faire policy with respect to press interviews with inmates" (Jurisdictional Statement, Appendix A, pp. IV-V). Where the district court erred was in determining that the Director of Corrections, faced with the circumstances of August 21, 1971, improperly ordered his subordinates to limit inmates' face-to-face interviews to interviews based on a random selection. Appellants maintain, and their arguments remain substantially unanswered, that the First Amendment does not afford inmates Hillery, Spain, Bly and Guile the right to demand and conduct face-to-face sessions with the press or other media representatives; that appellants, as responsible prison administrators, have discretion to manage their prisons by a measure such as Section 415.071; that Section 415.071 is rationally related to justifiable purposes of imprisonment; and that in any event the inmates have alternative means of exercising speech and seeking redress of grievances.

ARGUMENT

I

THE POLICY RESPECTING INTERVIEWS DOES NOT ENCROACH UPON ANY FIRST AMENDMENT RIGHT OF THE PRISONERS.

Appellees accurately point out that this Court has, on many occasions, acted to assure prisoners the right to petition for judicial relief. California courts have been equally alert in these matters. *See, e.g., In re*

Jordan, 7 Cal.3d 930, 500 P.2d 873, 103 Cal.Rptr. 849 (1972); *In re Van Geldern,* 5 Cal.3d 832, 489 P.2d 578, 97 Cal.Rptr. 698 (1971); *In re Harrell,* 2 Cal.3d 675, 470 P.2d 640, 87 Cal.Rptr. 504 (1970). California Penal Code section 2600 permits an inmate to correspond confidentially with any member of the state bar or public office holder, to own written material produced during imprisonment and to purchase, receive and read all books and periodicals accepted for distribution by the United States Post Office. California Government Code section 845.4 makes prison officials liable for intentional interference with the right of a prisoner to obtain judicial review of his confinement.

The Director of Corrections, under California Penal Code section 5058, must issue rules to protect the inmates in his care. These rules, *inter alia,* allow an inmate to correspond by sealed letter to the Governor, the Secretary of the Health and Welfare Agency, the Director, the Chief Deputy Director, an elected member of the state or federal Legislature, any other elected state or federal official, any appointed head of state or federal agency, or to the administrative head of the state or federal parole agency or board responsible for custody or release (Rule DP-2404); prevent opening and censoring of sealed correspondence from an inmate to a court (Rule DP-2403); recognize attorney-client privilege in written communications and prohibit auditory monitoring of attorney visits (Rule DP-2705); authorize emergency telephone calls between inmates and attorneys without monitoring (Rule DP-4213).

Grand juries have access to the prisons (Cal. Pen. Code §§ 919, 921) and committees of the Legislature are alert to prison problems and needs (*e.g.*, California Senate Select Committee on Penal Institutions).

A constitutional right of prisoners to face-to-face conferences with the press cannot be presumed to exist. Because a visit is sought by the prisoner with a person bearing press credentials does not generate a First Amendment right.

Appellant Procunier is responsible for the security of the California prisons and the care and rehabilitation of the people confined in them. Restricting prearranged personal contact between people on the inside with people on the outside is a reasonable action within the scope of his discretion, and does not involve a First Amendment right merely because press representatives are among those restricted.

Limiting personal contacts between appellees and the general public, which includes newsmen, is a matter of prison administration and not of federal constitutional right.

Appellees argue in terms of the "crucial role played by the press" in bringing to the public's attention information concerning prison conditions.[2] The issue here, however, is the demand of appellees, who are prisoners, to personally meet with press representatives. By Section 415.071 the prison authorities limit, but do not bar, such meetings or conferences. Inter-

[2]The record is unchallenged respecting the expansive program of the California Department of Corrections to assist the press in gathering news (*see* Appellants' Opening Brief, pp. 13-14; testimony of Phillip Guthry, A. 240-246; *see also* A. 59-68).

views may occur at random or in the setting of a discretionary special purpose visit (A. 51, 244-245).

II

THE POLICY RESPECTING INTERVIEWS IS A VALID EXERCISE OF APPELLANTS' AUTHORITY TO MANAGE PRISONS

The evidence in the district court established a "compelling state interest" which demanded the adoption of Section 415.071: the incident of August 21, 1971, alone would demonstrate this for among those who died that Saturday was the inmate who had been the subject of the greatest number of personal interviews. Nevertheless, the prison officials were not required to demonstrate this "compelling interest." *Seattle-Tacoma Newspaper Guild v. Parker,* 480 F.2d 1069 (9th Cir. 1973). The Seventh Circuit has recently reaffirmed the inappropriateness of this test in evaluating a restriction on an inmate's correspondence. *Morales v. Schmidt,* ..... F.2d ....., No. 71 C 29 (7th Cir., March 22, 1974) (en banc). The circuit court remanded the case to the district court, holding that the "district court erred in its holding that the standard which the state was required to meet to justify its restriction on Morales engaging in correspondence with his sister-in-law was to demonstrate a compelling interest." *Morales, supra,* slip op. at 3.[3]

[3]Although the Seventh Circuit correctly recognized that the compelling state interest test was inappropriate, appellants do not agree with the further finding that "the State must show on challenge that such restriction is related both reasonably and necessarily to the advancement of a justifiable purpose of imprisonment." *Morales v. Schmidt,* ..... F.2d ....., No. 71 C 29, Slip Op. at 3 (7th Cir. March 22, 1974) (en banc).

In the ambit of prison affairs the control of face-to-face meetings, whether between family member and inmate, or between clergyman and inmate, or between newsman and inmate, does not encroach upon a constitutional right. At most such regulation need meet a rational basis standard.

The record shows that Section 415.071 was promulgated on the Monday following the killings, after a great deal of agonizing, after consideration of other versions, with legal advice and, in view of the prior unrestricted interview policy, with reluctance.[4]

A curtailment of face-to-face meetings is not a cleaver which severs the inmates' contact with the press, with the public, or with the public through the press. Meetings with newsmen do not assure dissemination of the messages of Hillery, Spain, Bly and Guile to the public. Consequently, the "necessity" for confrontation urged by appellees is diminished and the conference becomes, at most, a convenient means of access to the press; it does not assure access to the

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[4]In the *Washington Post* proceedings, the Director of Corrections, appellant Procunier, testified: "[I]n order to correct the situation that was getting out of hand, in my opinion, after consulting with the wardens and my staff, time after time, to avoid putting in the very policy we have, because this disturbs me greatly, we had to go to this. Our relationship with the press has always been fine. I would prefer not to have this rule" (A. 302). In making his decision, appellant Procunier declined to administer the rule on the basis of the particular institution in which the inmate was housed, but applied it "across the board" (A. 303). The impact of these events was by no means isolated in San Quentin Prison. *See In re Henderson*, 25 Cal.App.3d 68, 72-73, 101 Cal.Rptr. 479, 481-482 (1972) (planned revolt at Folsom Prison in Sacramento County); *In re Hutchinson*, 23 Cal.App.3d 337, 341, 100 Cal.Rptr. 124, 126 (1972) ("time of great tension" at Deuel Vocational Institution in San Joaquin County).

public. It is not a *sine qua non* of the First Amendment.

Appellees Hillery, Spain, Bly and Guile made no showing that they are unable to transmit their manuscripts or to communicate information to those outside of the prison. The alternatives of written communication, of random interviews, of third party transmission have been available to them. Certainly, more personal and less time consuming means of communication may be imagined—such as unrestricted and unsupervised inmate access to all members of the public—but the hazards of each new expansion of the liberty of the legally confined must be measured against penal objectives, such as security in housing and preparation for return to free society (A. 292).

Section 415.071 is particularly suited to meet its objective and, at the same time, afford the inmate access to the press. The objective was a correctional answer to the crisis of August 21, 1971, which was brought on in part by press attention to disruptive, uncooperative and celebrated inmates (A. 246-249, 284-288). In *Estes v. Texas,* 381 U.S. 532, 545-550 (1965), the impact of television upon the lives of jurors, attorneys and judges in a trial setting was discussed. A similar disrupting consequence upon persons in a prison environment would not be purely hypothetical. Yet the design of Section 415.071 was to avoid unequal treatment of inmates which might result by the imposition of categories of those who could and those who could not have face-to-face interviews or, of institutions which permitted or did not permit

face-to-face interviews (A. 303). No classification of newsmen was attempted, either. Rather, a program giving inmates generally, or in the course of their institutional activities, access to visiting newsmen on assignment, was continued (A. 241-247, 290-294). In addition, writers with special projects have access, in the discretion of the Department, to inmates engaged in the activity or in the particular status under study (A. 244-246).[5] This is the same degree of access as given an approved member of the public who enters an institution to participate in a bridge club, a cultural event or a social program (A. 246).

Appellee Hillery sought publication of two short stories; appellee Spain is identified as a "talented black writer"; appellee Bly is a litigant in a pending court action; appellee Guile is described as a white prisoner apparently with views on racism and the relationship between blacks and whites "within the walls" (A. 26-29). An absence of literary skill is not even suggested. Nevertheless, even if it were assumed that appellees were unable to communicate in writing, they are not restrained from seeking help from other inmates and staff, or from orally communicating through approved visitors such as family members and friends, or through attorneys. *See Price v. Johnson,* 334 U.S. 266, 285 (1948) (no absolute right to oral argument); *Johnson v. Avery,* 393 U.S. 483

[5]Contrary to appellees' assertion, California does not distinguish between prisoners engaged in commercial writing and those not seeking remuneration (A. 124, 244-245). Those inmates who do receive payment for their manuscripts are authorized to keep their profits. *See In re Van Geldern, supra,* 5 Cal.3d 832, 489 P.2d 578, 97 Cal.Rptr. 698 (1971).

(1969) (inmate assistance in preparing written court pleadings); *Haines v. Kerner,* 404 U.S. 519 (1972) (less stringent standards for inmate drafted pleadings). While a California inmate is allowed to confer with his attorney to assure his access to the courts and protect his legal rights, or to meet with his clergyman in the exercise of his religious faith, or to visit with approved family members and friends to encourage his rehabilitation, no legal principle or penological consideration allows him to demand a personal meeting with a member of the press in lieu of other alternatives available to him.

In *Seattle-Tacoma Newspaper Guild v. Parker, supra,* 480 F.2d 1062 (9th Cir. 1973), federal prisoners joined in a suit brought by the press attacking a prison regulation which barred individual interviews. Like Section 415.071, the federal rule emanated from serious prison disorder in 1971, and was an abandonment of prior policy which afforded inmates relatively unfettered access to the press. The rule, unlike the California provision, was close to an absolute ban: " 'Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities.' " 480 F.2d at 1064, n. 5. The Court of Appeals sustained the provision:

> "The Director of the Bureau of Prisons and the Warden at McNeil Island are responsible for the security of the prison and the safety and

rehabilitation of its inmates, and accordingly they must be given wide discretion in formulating rules to govern prison life. In the instant case the Bureau of Prisons has given considerable study to the disruptive effects of prisoner interviews on prison administration, and has concluded that the ban on interviews is necessary to maintain the discipline, custody and control of the prison. We are unable to say that that conclusion 'lacks support in any rational and constitutionally acceptable concept of a prison system.' *Sostre v. McGinnis,* 442 F.2d 172, 199 (2d Cir. 1971) (en banc). We find that the interview ban is reasonable action within the scope of the wide discretion of the prison administrators and that it does not violate the prisoners' First Amendment rights. *Smith v. Schneckloth,* 414 F.2d 680 (9th Cir. 1969).

In concluding that the institutional concerns override the interest of the individual inmate in talking face to face with a member of the news media, we note that such a deprivation will not allow any real complaint about the treatment of the inmate or the administration of the prison to go unredressed. Prisoners are allowed by Bureau regulation to confer freely with their counsel, to conduct unlimited confidential correspondence, to visit with relatives and friends, to counsel with clergymen of their faith, and most important, to have free access to the courts. This court, as others, gives prompt and careful attention to prisoner petitions alleging violations of civil rights and counsel is appointed to assist the prisoner in those cases where the need therefor is demonstrated. [Footnotes omitted]." 480 F.2d at 1065-1066.

The *Seattle-Tacoma* case is indistinguishable from the instant case.

Even absent the factor of prison disorder, appellees' incarceration caused the necessary withdrawal or limitation of many privileges and rights. Access to the press, whether viewed as a privilege or a right, is not a vested interest of any citizen. *Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com.*, 412 U.S. 94, 126-127 (1973). The factor that access is sought in a prison facility is a significant consideration. *Adderley v. Florida,* 385 U.S. 39, 47 (1966). Face-to-face access is a further factor. *Kleindienst v. Mandel,* 408 U.S. 753, 765 (1972); *Zemel v. Rusk,* 381 U.S. 1, 16-17 (1965). In free society First Amendment rights may be curtailed based on the peculiar status of the individual. *United States C. Serv. Com'n v. National Ass'n of Let. Car.,* ..... U.S. ....., 93 S.Ct. 2880, 2891 (1973). This Court has stated: "We hold that when the Executive exercises this power [to admit aliens to this country] negatively on the basis of a facially legitimate and bona fide reason, the court will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Kleindienst v. Mandel, supra,* 408 U.S. 753, 770 (1972).

Appellees Hillery, Spain, Bly and Guile have been deprived of no federally-protected privilege or right by reason of Section 415.071.

CONCLUSION

Appellants urge this Court to set aside the summary judgment ordered by the district court whereby the appellees obtained declaratory and injunctive relief.

Dated, San Francisco, California,
April 8, 1974.

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